STATE OF MICHIGAN

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NINTH JUDICIAL CIRCUIT COURT
TRIAL DIVISION

TO: Judge Gorsalitz, Chairperson, MJA Rules Committee Members, MJA Executive Board Members

FROM: Judge Lamb

DATE: September 7, 2006

RE: AO File 2005-19 Proposed Amendment of Rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414 of the Michigan Court Rules

These are some thoughts, questions and comments pertaining to the proposed amendments contained in AO 2005-19. At the August MJA Annual Conference, MJA conveyed its position to the Judicial Conference on these matters as being generally no opposition to proposed changes that left discretion with a judge, but opposition to any change that mandated a practice. Due to time constraints we did not have the time at our annual meeting to fully discuss these proposed amendments, however a discussion that did take place raised many questions and concerns among the membership with these proposed amendments. We will be discussing these proposed amendments at the September 19, 2006 Rules Committee meeting and Executive Board meeting. I offer these thoughts, comments and questions to contribute to the discussion.

MCR 2.512(A)(2) In addition to requests for instructions submitted under subrule (A)(1), after the close of the evidence, each party shall submit in writing to the court a statement of the issues and may submit the party's theory of the case regarding each issue. The statement must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact that are supported by the evidence. The theory may include those claims supported by the evidence or admitted.

This proposed amendment uses the word "shall" to mandate a writing at the close of the evidence providing a statement of the issues. This could present some very practical problems. In most cases the plaintiff will close proofs first. This would allow the plaintiff's counsel to begin preparing the statement of issues. A defendant who presents evidence will not be able to begin to prepare this written statement until the close of the defense proofs. Each side will probably need some time to prepare these statements. Experience tells us that there will probably be objections to each side's submission and arguments over what the issues are. This process will probably delay argument and submission of the case to the jury.

The same problems would be presented in connection with submitting the theory of the case after the close of the evidence. My experience in most civil cases has been that the parties usually waive submission of theory and claim of the parties being read by the court. Usually

submitting a theory and claim generates more argument rather than shedding any light on the case. Closing arguments are ordinarily used by parties in lieu of the theory and claim.

Requiring a court in each and every case to require each party to submit statements in writing will, in my opinion, delay the orderly process of the case, add to the time necessary to try a case and add to the expenses and attorney fees of the parties. If this rule were discretionary, it could be utilized on occasion in very complex cases with advance planning and knowledge of the parties. To require this in each and every case does not seem warranted.

MCR 2.512(A)(5) The court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party.

This proposed rule says that the court need not give the statements of issues or theories of the case in the form submitted if the court presents to the jury the material substance of the issues and theories of each party. Does this mean that the court in each case must present to the jury the material substance of the issues and theories of each party even if they can't agree on the proper wording and the form of the submissions? If the court does not give the statements of issues or theories of the case in the form submitted, but rather substitutes its own language, isn't this fertile ground for objections that the court has abandoned its neutral role and in making the presentation to the jury has unduly emphasized one side or the other's theory? This seems to be another form of the theory and claim, which most attorneys in civil cases waive because of the problems of agreeing upon the proper language to be used. Why put the court in the middle of this battle?

MCR 2.512(B)(2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

Having the court instruct the jury on the applicable law is the duty of the court. The remaining portion of paragraph 2 requiring the court to instruct on the issues presented by the case and if a party requests as provided in subrule (A)(2) that party's theory of the case injects the court into debatable issues and presents the same problems discussed above. I think the best practice is to leave the law to the court and arguments on the theories and issues to the attorneys who tried the lawsuit tying those issues to the evidence as the attorneys see it. The jury is the finder of the facts in the case and their findings will determine the issues which will be disposed of by the jury's fact finding function.

MCR 2.513(A) Preliminary Instructions. After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.

This rule has the mandatory "shall" requiring the court to provide each juror with a copy of instructions. On a case-by-case basis written instructions may be appropriate. Courts should be given the discretion by using the word "may" rather than being mandated to have a one rule fits all cases and having a practice and procedure mandated in the abstract.

MCR 2.513(G) Scheduling Expert Testimony. The court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:

(3) Providing for a panel discussion by all experts on a subject after or in lieu of testifying. The panel discussion, moderated by a neutral expert or the trial judge, would allow the experts to question each other.

Recognizing that this rule is a discretionary call by the court, the provisions of subparagraph 3 are novel and, in my view, would raise some serious questions as to the function of a trial judge in conducting a trial. If the panel discussion was occurring live before the jury, a judge may be able to control the questioning by experts. If the panel discussion was in lieu of testifying would this be a panel discussion via deposition? Traditional or video? Concerning a panel discussion, if a court, in the exercise of its discretion, allowed a neutral expert to moderate the discussion and the experts to question each other, questions are raised. Assuming that the court would determine who is neutral, when would this decision be made and supposing there are experts in different fields who are going to participate in this panel discussion. Does that mean there are two or more neutral experts? This panel discussion and the questioning of experts by each other would seem to seriously erode the requirements of MRE 702 and 703. How is a judge to serve his or her role as a gatekeeper of the evidence consistent with Daubert and Kumho? Gilbert v Daimler Chrysler, 407 Mich 749 mandates the court's gatekeeper role under MRE 702 and requires the court to act as a gatekeeper at all stages of expert analysis. Questioning of experts by each other could make it difficult if not impossible for a court to enforce MRE 702 and 703 particularly if the discussion is moderated by a "neutral expert". The process envisioned by this particular subsection of the rule will provide a high likelihood that the trojan horse referred to in Gilbert p. 783 will be brought before the jury in the panel discussion.

MCR 2.513(K) Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions may only take place when all jurors are present and that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

This proposal would allow an instruction that jurors are permitted to discuss the evidence amongst themselves in the jury room during trial recesses. This discretionary authority to the court follows an instruction to the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel. Although the second half is discretionary with the court, it seems to contradict the first instruction and what we tell jurors generally, which is to keep an open mind and not discuss the case until they have heard all the evidence, arguments and instructions on the law. If I were a juror and I heard this instruction

including the discretionary instruction, I would wonder why I am being given two inconsistent instructions.

MCR 2.513(M) Comment on the Evidence. After the close of the evidence and arguments of counsel, the court may fairly and impartially sum up the evidence and comment to the jury about the weight of the evidence, if it also instructs the jury that it is to determine for itself the weight of the evidence and the credit to be given to the witnesses and that jurors are not bound by the court's summation or comment. The court shall not comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury.

Having a court comment about the weight of the evidence and then telling the jury that jurors are not bound by the court's summation or comment is, in my view, not a good idea. I recognize the Federal Courts can do this, however jurors, in my experience, place great credence on what a court tells them and they respect what trial judges tell them. However, I think it is beyond the ability of most jurors to not somehow be influenced by what the judge tells them about the weight of the evidence. A trial is an adversarial process. If the evidence presented on one side of a case seems more compelling to a judge than the evidence presented by the other side, a judge commenting in this fashion might appear to be siding with one of the adversaries.

MCR 2.513(N)(2) Solicit Questions about Final Instructions. As part of the final jury instructions, the court shall advise the jury that it may submit in a sealed envelope given to the bailiff any written questions about the jury instructions that arise during deliberations. Upon concluding the final instructions, the court shall invite the jurors to ask any questions in order to clarify the instructions before they retire to deliberate.

If questions arise, the court and the parties shall convene, in the courtroom or by other agreed-upon means. The question shall be read into the record, and the attorneys shall offer comments on an appropriate response. The court may, in its discretion, provide the jury with a specific response to the jury's question, but the court shall respond to all questions asked, even if the response consists of a directive for the jury to continue its deliberations.

This proposed instruction mandates a practice and I object to a mandatory practice for all cases in all circumstances. In my experience it has never been necessary to advise the jury that they may ask a question. In some cases the first thing that the jury does after electing a foreperson is write a question if they have one. This proposal would also mandate that the court invite jurors to ask questions in order to clarify instructions before they retire to deliberate. Oftentimes jurors in deliberations resolve questions they have about instructions, and many other matters, by discussing the case with one another. That is their function as jurors to discuss the case. Why require a trial judge to invite the jurors to ask questions before they even leave the courtroom? I think that jurors should have an opportunity to retire to begin to deliberate to determine if in fact they have any questions; or if one juror has a question, it may perhaps be answered by other jurors. This rule as proposed is, in my view, another example of a practice being mandated in the abstract.

MCR 2.513(N)(3) Copies of Final Instructions. The court shall provide each juror with a written copy of the final jury instructions to take into the jury room for deliberation. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions.

This is another example of a mandated requirement. Written copies of final jury instructions are appropriate in many cases. However, in my view they are not necessary in each and every case and a judge should have discretion with input from the attorneys as to when written instructions should be given to the jury. If a court may exercise discretion regarding providing a jury with a copy of electronically recorded instructions, why not give the court the same discretion with reference to written instructions? I recognize that not all courts use electronic equipment for recording trials, but I think the principle is the same with reference to a court exercising its discretion on a case by case basis as to the wisdom of providing or not providing written or electronically recorded instructions.

MCR 2.513(N)(4) Clarifying or Amplifying Final Instructions. Where it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions.

If a court were to use this proposed provision and invite jurors to list issues that divide or confuse them, what does this do to the secrecy of jury deliberations and a long established rule that the sanctity of juror deliberations and discussions shall not be invaded? Other than the mere passage of time, what will make it "appear" to a court that a deliberating jury has reached an impasse or is otherwise in need of assistance?

Many of these proposals might work in many cases and not in others. Judges should be allowed to experiment with the best method of trying a case. It is a trial judge's obligation to ensure that the case proceeds in an orderly fashion and that the law is given to the jury in appropriate instructions. Judges should have discretion to discharge this obligation depending upon the needs of each case. Mandated requirements concerning practice and procedure and the manner in which a trial judge discharges his or her obligations rarely fit the need for each and every case.

CC: Corbin Davis, Supreme Court Clerk
Judge William D. Giovan, Chair Model Civil Jury Instruction Committee
Kalamazoo County Circuit Judges